WISCONSIN

Wetland Compensatory Mitigation Regulations

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Overview

- **Background on wetland regulations in Wisconsin**
- **Recent law changes**
  - Act 6 of 2001(s 281.36) for non-federal wetlands
  - Act 147 of 2000 (s 281.37) Compensatory Mitigation defined
- **NR 350 rule requirements**
- **NR 103 decision making process**
- **Questions and Answers**

Wisconsin Does Not Have A Comprehensive State Wetland Protection Law

- **WI Chapter 30 regulates activities on bed and banks of waters of the state, which can include wetlands**
- **Local shoreland-wetland zoning**
- ***Most* wetland impacts regulated by the Federal Government under Section 404 of the Clean Water Act**
- **State involved in federal permit decisions under Section 401 for water quality certification—NR 103 is the standards for decisions and NR 299 is the regulatory process for the decisions**
- **NR 103 mirrors the 404(b)1 Federal guidelines.**
- **Prior to 2002, NR 103 was silent on compensatory mitigation.**

State Wetland Law Changes

- **Act 6 (s 281.36) passed May 2001 in reaction to US Supreme Court decision (SWANCC) giving state authority over non-federal wetlands.**
- **Act 147 (s 281.37) passed May 2000 giving DNR authority to consider compensatory mitigation and this is reflected in NR 103 and NR 350**

SWANCC

- **Solid Waste Agency of Northern Cook Co.**
- **5-4 US Supreme Court Decision-- January 9, 2001**
- **Invalidated the "migratory bird rule" limiting federal 404 authority to "actually navigable waters, their tributaries, and wetlands adjacent to each."**
- **Called to question federal jurisdiction over isolated wetlands**

Wisconsin Response to SWANCC

- Governor Briefing
- DNR Communication Plan
- Coalition of Environmental, Conservation, Hunting and Fishing Groups at table with Wisconsin Realtors Assn. and Wisconsin Builders Assn.
- Consensus bill drafted

2001 Wisconsin Act 6

- Governor calls special session
- Passed unanimously in both legislative houses
- Signed into law on May 7, 2001
- Section 281.36 went into effect 12:01 a.m. on May 8, 2001
- Wisconsin was the first State to react to SWANCC decision and is now used as a national model

Elements of Act 6

- **“Non-federal wetlands” require an individual water quality certification from DNR**
- **Exemptions analogous to 404 (NR 351)**
- **Delineation of non-federal wetlands to follow 1987 Federal Manual (NR 352)**
- **State inspection authority for non-federal wetlands and enforcement authority through DOJ for violations**

The Wetland Mitigation Law

- **Bill passed unanimously in May 2000**
- **Act 147 created ss. 281.37, Wis. Stats.**
- **Required DNR to write rules for mitigation projects and banking— NR 350**
- **Required DNR to write rules for a process for considering compensatory mitigation in permit decisions—revised NR 103**

Origins of Wetland Mitigation

- **Requirement in the federal wetland permit process since the early 90's**
- **The federal process requires the applicant to follow a sequence-- avoid, minimize, then compensate**
- **Prior to Act 147, the state process under NR 103 mirrored the federal process *with the exception of a compensation step***

What is the wetland mitigation sequence?

1. **AVOID the impact by not taking a certain action or parts of an action.**

2. **MINIMIZE the impacts by altering the project.**

3. **COMPENSATION for the impact by replacing or supplying a substitute.**

Compensation = "Compensatory Mitigation"

- **The restoration, enhancement, or creation of wetlands expressly for the purpose of compensating for unavoidable adverse impacts that remain after all appropriate and practicable avoidance and minimization has been achieved.**

Role of Mitigation in Wetland Regulatory Decisions

- **NR 350 explains what is required when an applicant proposes mitigation**

- NR 103 addresses how and when DNR will consider mitigation in decisions

NR 350-The Mitigation Rules

- **Addresses the requirements of ss 281.37**
- **Based on *Guidelines for Wetland Compensatory Mitigation in Wisconsin*-- a work effort of the mitigation advisory committee**
- **NR 350 and the *Guidelines* are the subject of an August 2002 MOA between the state and federal agencies**

Highlights of NR 350

- **Sequence of <u>compensatory</u> mitigation following avoidance and minimization**
  1. Search On-Site first. On-site means within 1/2 Mile of Wetland Impact

  2. Then Off-site. As near as possible to wetland impact, by doing any of the following:
     - Restore a wetland within a prescribed search area
     - Purchase from a DNR approved bank within the search area

Highlights of NR 350 (cont'd)

- **MITIGATION BANKING**

- **A "bank sponsor" develops a compensation site called a "bank site" and enters into a formal legal agreement with the agencies to sell "credits" to permittees who need mitigation.**

- **A Mitigation Bank Review Team (MBRT), made up of DNR, COE, EPA, and FWS, must approve the bank and bank site plans.**

Role of the Bank Sponsor

- **Proposes a bank and bank site**
- **Bank approved through signing a formal bank document with agencies**
- **Bank site and number of credits must be approved through agency involvement**
- **Financial assurances required**
- **Banker sets the price per credit and must report sales of credits annually**
- **Service area is Basin + county + 20 mile radius**

Purchasing Bank Credits

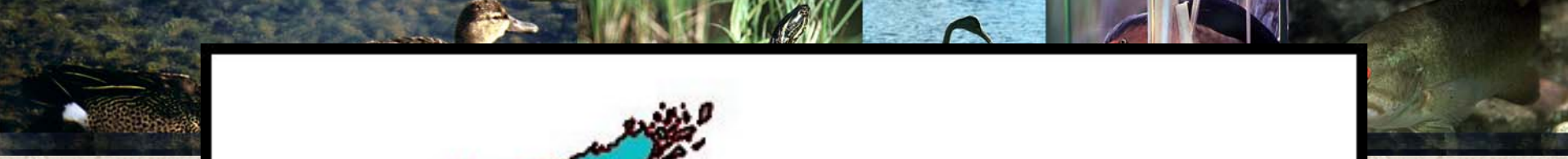
- Applicant shows on-site is not feasible
- Applicant opts to not build its own mitigation site and looks for a bank that is listed on state registry
- Applicant contacts the bank and negotiates a price
- Applicant provides an affidavit of purchase of credits

Wisconsin Mitigation Banks

- **Mitigation Banking is occurring nationally and is not new in Wisconsin.**
- **Walkerwin Wis. Waterfowl Assn. Bank -** one bank site in Columbia County for general use
- **Northland Cranberry Bank -** one bank site in Wood County for general use
- **Dane County Bank -** one bank site near Lodi for county and municipal use
- **DOT Bank-** 30 bank sites located statewide which are for exclusive use by DOT

Wisconsin Proposed Mitigation Banks

- **Onyx Glacier Ridge- Upper Rock Basin, Dodge County**
- **Onyx Emerald Park- Illinois-Fox Basin, Waukesha County**
- **Upper Chippewa-- Upper Chippewa Basin, Sawyer County**



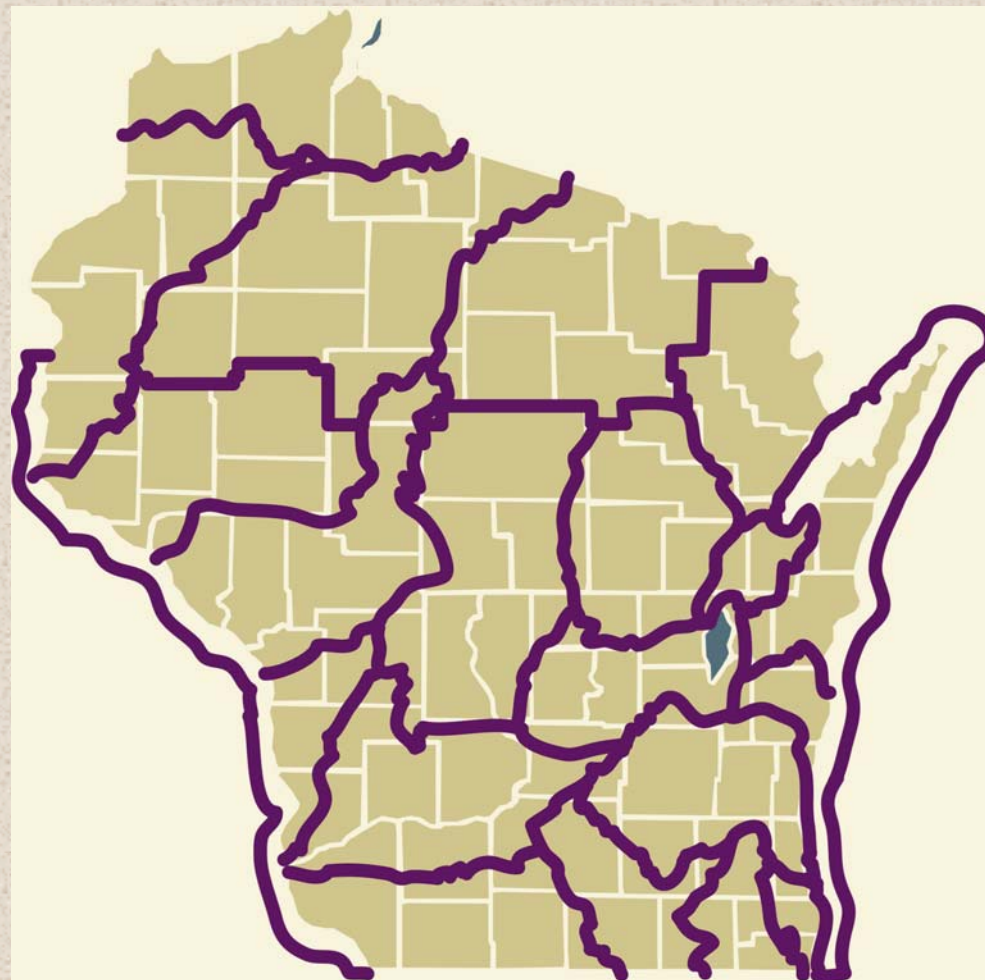
LAKE SUPERIOR
ST. CROIX
HEADWATERS
UPPER GREEN BAY
LOWER CHIPPEWA
WOLF
LOWER FOX
LAKE SHORE
MISSISSIPPI-LOWER ST. CROIX
BLACK-BUFFALO-TREMPEALEAU
LA CROSSE-BAD AXE
SHEBOYGAN
MILWAUKEE
ROOT-PIKE

Two “Grandfathered” Mitigation Banks

- Approved by Corps of Engineers before NR 350 went in effect
- NR 350 allows WI Waterfowl Assn and Northland to have a statewide service area
- Per code, MOU with each that requires bank sponsor to “facilitate restorations” in the basins of its statewide customers

Compensation Search Area

- **Search area for off-site mitigation**
- **Service Area for New Banks**
- **Includes all of the following areas**
  - County where the project is located
  - Entire Basin or (GMU) where the project is located
  - Twenty mile radius from the project site



Off-site Search Area

- **Includes all of the following areas**
  - ***County where the project is located***
  - Entire Basin where the project is located
  - Twenty mile radius from the project site

Off-site Search Area

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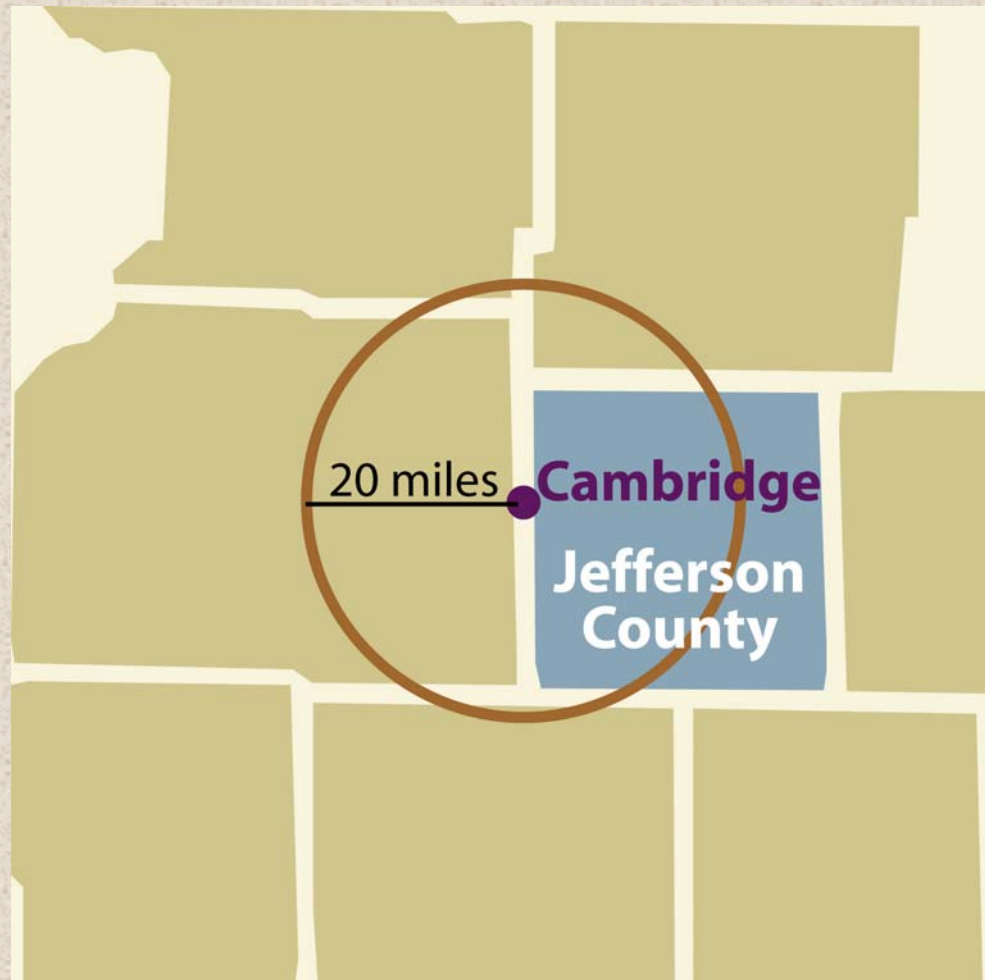

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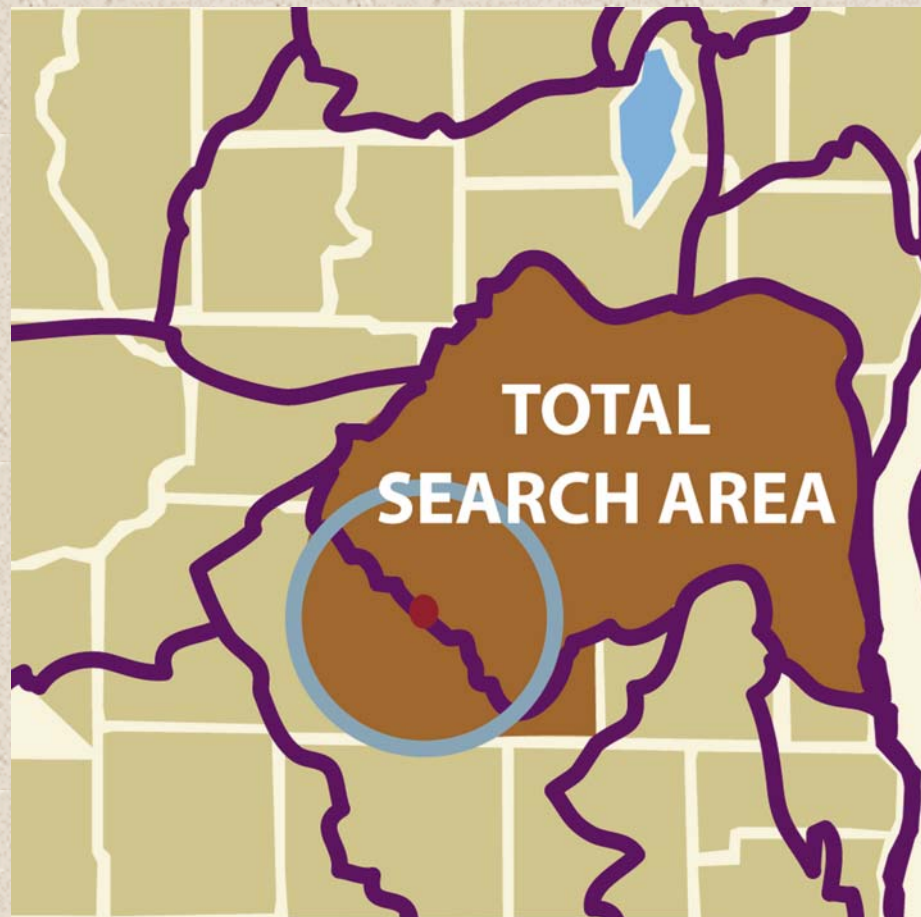

Highlights of NR 350 (cont'd)

- **Replacement Ratios**
  - To answer the "how much" question
  - Ratio is in terms of mitigation acres to acres of wetland loss
  - Purpose of ratios is insurance of mitigation success and to account for temporal wetland function loss.
  - Wisconsin took a simple approach to ratios
  - The ratio is 1.5:1 in most cases
  - 1:1 is possible
  - Our real goal is to have all mitigation sites be quality sites

Highlights of NR 350 (cont'd)

- **Requirements for sound planning and design of compensation sites**
  - Goal is quality mitigation sites
  - Restoration preferred over creation
  - Stormwater ponds are not mitigation
  - Short and long-term monitoring requirements
  - Plans for long-term site management
  - Financial assurances that the site will be constructed and maintained as approved
  - Long-term protection using conservation easements

Role of Mitigation in Wetland Regulatory Decisions

- NR 350 explains what is required when an applicant proposes mitigation

- **NR 103 addresses how and when DNR will consider mitigation in decisions**

NR 103, Wetland Water Quality Standards

- **Wetland water quality standards went in effect on August 1, 1991**
- **NR 103 is based on the federal section 404 process**
- **NR 103 process used by DNR in its "Water Quality Certification" decisions involving both federal and non-federal wetland activities**

Review of the Key Elements of NR 103 Decision Process

1. **Practicable Alternative Analysis**
   - **Avoid and minimize wetland impacts in light of the overall basic purpose of the project**
   - **Applicant demonstrates that there are no practicable alternatives**

2. **No Significant Adverse Impacts to Wetland Functions and Values**

How Projects Are Reviewed

- **The NR 103 Table to present NR 103.08(4)**
  - Five different categories
  - Process, including how mitigation is considered, set for each column
  - *Avoid* is always the first step
  - Very important to pay attention to the footnotes

Process Steps (read down)	Description of the Activity				
	A. The Standard Process for activities that do not fall under Columns B through E	**B. Activity to impact an Area of Special Natural Resource Interest[3]**	**C. Activity involves wetland impact of 0.1 acre or less or activity is wetland dependent**	**D. Each of the Wetlands affected is <1 acre in size, outside the 100-year floodplain, and not on the list of certain types[4]**	**E. Cranberry Operation**
Practicable Alternatives Analysis[1]	1. Is there an **avoid** Alternative? 2. How Can Wetland impacts be **minimized**?	1. Is there an **avoid** Alternative? 2. How Can Wetland impacts be **minimized**?	1. Is there an **avoid** Alternative? 2. How Can Wetland impacts be **minimized**?	1. Is there an **avoid** Alternative? 2. How Can Wetland impacts be **minimized**?	1. Is there an **avoid** Alternative? 2. How Can Wetland impacts be **minimized**?
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How is Compensatory Mitigation Considered by DNR ?

- **In some cases it is considered at the same time as avoid and minimize alternatives (see columns C and D)**
- **In some cases it is only after a hard look at avoid and minimize alternatives (see column A)**
- **In some cases it cannot be considered (see columns B and E)**

When Mitigation is Considered WITH Alternatives Analysis

- **Wetland Impacts would be 0.1 acre or less**
  - NR 103 table column “C”
- **Activity is wetland dependent**
  - NR 103 table column “C”

- **In some cases AVOID may be the best environmental decision**

The NR 103 Table

Process Steps (read down)	Description of the Activity				
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When Mitigation is Considered WITH Alternatives Analysis

- **All adversely impacted wetlands are < 1 Acre, and not in 100 Year Floodplain and not "certain" types**
  - NR 103 table column "D"

- **In some cases AVOID may be the best environmental decision**

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“Certain Types” in Column D

- **Deep marsh.**
- **Ridge and swale complex.**
- **Wet prairie not dominated by reed canary grass (*Phalaris arundinacea*) to the exclusion of a significant population of native species.**
- **Ephemeral pond in a wooded setting.**
- **Sedge meadow or fresh wet meadow not dominated by reed canary grass (*Phalaris arundinacea*) to the exclusion of a significant population of native species and located south of highway 10.**
- **Bog located south of highway 10.**
- **Hardwood swamp located south of highway 10.**
- **Conifer swamp located south of highway 10.**
- **Cedar swamp located north of highway 10.**

When Mitigation Is Considered AFTER Alternatives Analysis

- **This is the standard approach**
  - NR 103 table column “A”

- **DNR can look at compensatory mitigation proposal in weighing the overall impacts of the proposed project when offered by the project proponent**

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When Mitigation CANNOT be Considered by DNR

- **Project will affect an "Area of Special Natural Resource Interest"**
  - NR 103 table column "B"
- **Cranberry Operations**
  - NR 103 table column "E"

The NR 103 Table

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Misconceptions about Compensatory Mitigation in Wisconsin

- **The state requires compensatory mitigation for all unavoidable wetland loss.** FALSE
- **Any wetland fill can occur as long as mitigation is included.** FALSE
- **The goal of the program is to make sure we replace every wetland filled.** FALSE

Summary of Mitigation Program

- Program went into effect February 2002
- 20 applications have been approved with a mitigation component (15 bank purchases)
- 3 proposed banks

- Updates and more information at: www.dnr.state.wi.us/org/water/fhp/wetlands/mitigation/index.html